SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 630

UNITED STATES OF AMERICA and STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Petitioners,

vs.

ALFRED E. COLEMAN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Opinion Below.

The United States District Court did not write an opinion. The opinion of the United States Court of Appeals for the 9th Circuit (App., *infra,* pp. 1-26) is reported in 363 F. 2d 190; and in a decision on rehearing (App., *infra,* p. 28) the court affirmed its earlier opinion which is reported at 379 F. 2d 555.

Jurisdiction.

The judgment of the Court of Appeals (App., *infra,* p. 27) was entered on June 21, 1966. A timely petition for rehearing was granted on February 8, 1967 [R. 301], and on rehearing the court confirmed its prior decision by decision entered on June 20, 1967 (App., *infra,* p. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutes Involved.

Section 1 of the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. 161, provides, in pertinent part:

> "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. . . ."

Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611 (Section of Surface Resources Act), provides:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *provided, however,* that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

Restatement of Questions Presented.

The questions of law posed by Petitioners do not, in the opinion of Respondents, accurately state the issues. The real issues are:

1. Whether, in order to establish a discovery of building stone on "lands chiefly valuable for building stone" within the meaning of 30 U.S.C. Sec. 161, Respondents need only show that the discovery was of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable building stone operation;

2. Whether building stone, which was distinctive because of its range of colors and was capable of being cut and shaped for ornamental building stone uses, was a "common variety" of "stone" within the meaning of 30 U.S.C. Sec. 611.

Concise Statement of the Case.

Respondent, Coleman, made his eighteen placer mining locations for building stone in the dry bed of Baldwin Lake and adjoining steep mountains during the period 1949 to 1952, pursuant to 30 U.S.C. Sec. 161, which provides in pertinent part that:

> "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims."

Coleman applied for a mineral patent in January, 1956. A contest was commenced at the instance of the Forest Service on February 24, 1958, the pertinent charges being that:

(a) The lands embraced within the claims are non-mineral in character;

(b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

The Government witnesses testified the mining claims were covered with a massive quartzite bed [T. 15][1] of various colors [T. 17] suitable for building stone [T. 31]. This building stone is known in the trade as "Big Bear" building stone [T. 57] and is a very good material [T. 59]. The market for building stone goes in cycles [T. 58]. The Government witness testified that an examination of Coleman's sales receipts indicated numerous small sales had been made over the years [T. 23].

Coleman testified concerning sales of the building stone that he had made, but stated that he had not advertised the building stone [T. 73].

Coleman's good faith in locating the mining claims for mineral resources was not made an issue in the contest charges; nor was any evidence submitted by the Government concerning his good faith.[2]

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[1]"T." as used in this brief refers to *Transcript* dated September 16, 1958, in *United States v. Coleman et al.*, in Contest No. 6833.

[2]In the Footnote at page 9 of the Petition, Petitioners for the first time apparently seek to make the good faith of Respondents an issue when they refer to a residence constructed on the placer mining claims by Respondents and then state: "Once a patent is issued, the land could, of course, be used for any private or com-

There was no evidence whatever submitted by the Government that the land covered by the mining claims had any value except for building stone.

The Hearing Examiner on December 18, 1958, found five of the mining claims to be valid, and the other thirteen to be invalid. On appeal, the Acting Director of the Bureau of Land Management on June 22, 1960, sustained the validity of three claims and a part of a fourth.

The Secretary, acting through his Deputy Solicitor, concluded that all of the building stone claims of Coleman were null and void because they lacked discovery. (*United States v. Alfred Coleman,* A-28557, March 27, 1962.) This conclusion was based on the belief that to have a discovery Coleman had to prove a market for profitable sales before July 23, 1955, and this Coleman had not done, according to the decision, which states:

> "The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. * * * He (*Coleman*) was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit." (Word in italics added.) (*United States v. Alfred Coleman,* App. p. 38).

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mercial purpose Coleman chooses." Petitioners' witness before the Hearing Examiner stated that the improvements found consisted principally of improvements to facilitate the removal of mineral from the claims [T. 24]. The residence consists of one bedroom, a bathroom, a living room, a kitchen, and a large shop area for maintaining machinery [T. 62].

The United States instituted an action to eject Coleman and his lessee from the mining claims which the Secretary of the Interior had declared to be void. Coleman answered and counterclaimed, seeking an order directing the United States to instruct the Secretary of the Interior to issue mineral patent for the mining claims.

The District Court granted summary judgment for the United States and awarded damages in the sum of $1,870.50. (*United States v. Coleman, et al.,* No. 63-956-WB Civil, So. Cal., May 12, 1965.)

On appeal, the United States Court of Appeals for the Ninth Circuit held that the applicable criteria of presence of a valable mineral in each of the claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine; further, that Congress by enacting 30 U.S.C. 611, did not repeal 30 U.S.C. 161 concerning building stone, and proof of discovery of a valuable mineral is to be determined as of the date of the contest hearing and not as of July 23, 1955.

The Court of Appeals remanded the case

> ". . . to the District Court with instructions to enter judgment denying Plaintiff's prayer for ejectment and, on the counterclaim, reversing the final decision of the Secretary of Interior and remanding the case to the Department of the Interior for further proceedings and decision in accordance with the principles herein enunciated." (*Alfred Coleman, et al. v. United States of America*—App. p. 26).

ARGUMENT.

Reasons Why the Writ Should Not Be Granted.

Respondents contend that Petitioners have stated no valid reasons for granting of a Writ of Certiorari by this Court.

The decision in the above entitled case rendered by the Court of Appeals for the Ninth Circuit:

(a) Is not in conflict with the decision of another court of appeals on the same matter;

(b) Does not involve any important question of federal law which has not been settled by this Court;

(c) The Court of Appeals of the Ninth Circuit did not decide any federal question which is in conflict with applicable decisions of this Court.

1. There Is No Conflict Between the Decision of the Ninth Circuit and Decisions of This Court Dealing With the Test of the Presence of Valuable Minerals to Constitute a Discovery.

This Court said, in *Best v. Humboldt Mining Co.*, 371 U.S. 334, 335-336, referring to a mineral discovery:

> ". . . The discovery must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.' *Castle v. Womble,* 19 L.D. 455, 457; *Chrisman v. Miller,* 197 U.S. 313, 322, 25 S. Ct. 468, 49 L. Ed. 770; *Cameron v. U.S., supra,* 252 U.S. 459, 40 S. Ct., 412."

The Ninth Circuit, in the case at bar, faithfully followed the above rule of this Court, and in applying it to this case stated that:

> "4. The applicable criteria of presence of a valuable mineral in each of the claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." (App. p. 25).

The Ninth Circuit stated further that the market factors, which the Petitioners contend is the basis of the "present marketability at a profit" test, should not be disregarded in connection with the issue of mineral discovery. These factors may be relevant evidence on this issue, as well as the issue of good faith,

> ". . . But these ultimate issues should be resolved in each case from the evidence as a whole and it is improper, in our view, to convert one aspect of relevant evidence into an absolute legal requirement with respect to a certain class of minerals in derogation of a time-honored, judicially approved test of 'value' applicable to all locatable minerals." (App. p. 22).

2. No Conflict Exists Between the Decision of the Ninth Circuit and Any Other Decision.

As a reason for petitioning for a writ of certiorari, Petitioners contend that the decision of the Ninth Circuit Court of Appeals herein is in conflict with *Foster v. Seaton,* 251 F. 2d 836 (C.A.D.C.—1959).

The decision of the Court of Appeals of the Ninth Circuit in the *Coleman* case, at bar, is not in conflict

with said *Foster v. Seaton.* The two cases do not deal with the same subject matter, the facts are dissimilar, and the two cases involve different issues.

In *Foster v. Seaton,* the court was dealing with sand and gravel which at the time of the decision was declared by the Act of 1955 (69 Stat. 368, 30 U.S.C. 611) to be a "common variety" and not subject to location of mineral claims *thereafter* under the mining laws.

The *Coleman* case, at bar, is dealing with the location of "building stone" which is specifically made locatable by 30 U.S.C. Sec. 161.

In *Foster v. Seaton,* the court was dealing with a contest between parties who claimed an interest in the land involved, under the Small Tract Act, 68 Stat. 239 (1954), 43 U.S.C. Sec. 682a, *et seq.,* and the locator of the mining claims, which were located for sand and gravel. In the case at bar, the contest is between the United States of America and the locator of building stone, a locatable material under 30 U.S.C. Sec. 161.

In *Foster v. Seaton,* there was a question of bona fide intent by the locator, that is; the question as to whether or not the mining claims had been located for mining purposes or for some other purpose. The Court of Appeals in *Foster* said:

> ". . . the Department has stressed an additional requirement of present marketability in order to prevent misappropriation of lands containing these materials by persons seeking to acquire such land for purposes other than mining."

The Government did not raise the issue in the case at bar as to whether or not Coleman made his location to

acquire ground for purposes other than mining building stone. The proof clearly shows that Coleman was mining, and the Department of Interior did not question that fact.

The issues in the matter involved in the two cases, viz., *Foster v. Seaton* and the case at bar, of Coleman, are so far apart that there can be no conflict between the decisions of the two courts.

3. Respondents' Building Stone Is Not a "Common Variety."

The decision of the Department of the Interior which held Coleman's placer claims invalid erroneously states:

> "Congress withdrew common varieties of *building* stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. 1958 ed., sec. 611)." (Emphasis added.)

The cited statute makes no mention of "building stone," the statutory words being "common varieties of sand, stone, gravel, pumice, pumicite or cinders." The building stone on the Respondents' claims has a variety of colors [T. 17] and is capable of being cut and shaped [T. 57]. This removes the building stone on these claims from the classification of common varieties of stone because 30 U.S.C. Sec. 611 expressly excepts from "common varieties" deposits of stone "which are valuable because the deposit has some property giving it distinct and special value." As the Ninth Circuit said in the case at bar:

> "Stone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone."

The Department's decision attempted to avoid this logical conclusion by stating:

> "In view of the immense quantities of identical stone found in the area outside of the claims, the stone must be considered a 'common variety' within the meaning of the act."

A deposit of pure white marble ideally suited for ornamental building stone, monuments, and statues would be a common variety if it happened to be common to a particular locality if such a construction prevailed. The Ninth Circuit, in the case at bar, aptly points out:

> "'The Department's 'quantity equals common variety' formula is not consistent with either the letter or spirit of the 1955 statute."[3]

The Ninth Circuit followed the decisions of this Court in holding that the Secretary of the Interior does not have the power to legislate (*United States v. United Verde Copper Co.*, 196 U.S. 207; *United States v. George*, 228 U.S. 14); hence his action in ignoring the existence of the valid subsisting statute under which the Coleman mining claims were located (30 U.S.C., Sec. 161) is beyond his authority.

Petitioners suggest that millions of acres of land are potentially subject to building stone claims for non-mining purposes unless their construction of 30 U.S.C. Sec. 611, to the effect that 'quantity equals common variety,' is applied. Petitioners' apprehension in this

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[3]House Report 730 to accompany H.R. 5891, 84th Congress, 1st Session (2 U.S. Cong. and Admin. News, 84th Cong., 1st Session, 1955, at page 2482), illustrates that Congress did not intend that common occurrence of a mineral in a locality would make a common variety. In this Report it is stated that limestone and gypsum are not common varieties since they are commercially valuable because of "distinct and special" properties.

regard is misplaced. 30 U.S.C. Sec. 161 permits building stone locations only on "lands that are chiefly valuable for building stone." Lands with building stone which are chiefly valuable for other purposes may not be located for building stone. Respondents complied with Sec. 161, since it is uncontradicted that the lands involved here are chiefly valuable for building stone and, indeed, have no other value. Petitioners are assured that Respondents' placer mining claims—and, indeed, all mining claims validly located under Sec. 161—will be located and used for mining purposes, since this is the chief value of the land. Petitioners do not assert that the millions of acres which they suggest "are potentially subject to building stone claims" are chiefly valuable for building stone and, of course, there is no evidence of this.

4. The Department of the Interior Has Recognized the Legal Effect of the Act of August 4, 1892 (27 Stat. 348, 30 U.S.C. Section 161).

The Department of the Interior has continuously recognized the existence of Section 161 of 30 U.S.C., which is the Building Stone Act, under which Mr. Coleman located his eighteen placer mining claims.

(a) The 1954 issue of 43 Code of Fed. Reg. Section 185.30, reads as follows:

> "Building-Stone Placers. The act of August 4, 1892 (27 Stat. 348; 30 U.S.C. 161) extends the mineral land laws so as to bring lands chiefly valuable for building stone within the provisions of said laws."

(b) This same language appears in the 1964 edition of Section 3416.7 (43 C.F.R. Suppl. of April 1, 1964).

(c) In the January 1, 1966, issue of 43 Code of Federal Regulations, at page 606, the Department again repeats the section with regard to building-stone as follows:

> "3416.7 Building stone placers. The act of August 4, 1892, (27 Stat. 348; 30 U.S.C. 161), extends the mineral land laws so as to bring lands chiefly valuable for building stone within the provisions of said laws."

Notwithstanding the law and regulations, the Department of the Interior was acting in the Coleman contest in direct conflict with its regulations that "Section 161" continued to be operative.

Surely, in the light of the foregoing, the representatives of the Department cannot now in good conscience represent to this Court that said Section 161 was repealed by implication by the passage of the Surface Use Act of July 23, 1955.

Conclusion.

It is clear that there is no conflict between the Ninth Circuit decision in the Coleman case and any other circuit decisions; that there is not involved here an important question of federal law which has not been settled by this Court; and that the decision of the Court of Appeals for the Ninth Circuit follows the decisions of this Court.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20227

ALFRED COLEMAN AND EDWARD J. McCLENNAN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE.

[June 21, 1966]

On Appeal from the United States District Court Southern District of California Central Division

Before: CHAMBERS and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge:

Appellant has brought the case here to review the order of the District Court granting summary judgment to Appellee and dismissing Appellant's counterclaim. As originally filed by the United States, the suit was for ejectment of Coleman from his mining claims in the San Bernardino National Forest. The claims had been contested by the United States at the instance of the Forest Service in proceedings before the Interior Department and found invalid. In the District Court, Appellant counterclaimed, seeking judicial review of the decision of the Interior Department under the Administrative Procedure Act, 5 U.S.C. § 1001, et seq. The initial problem here is the appropriateness of Appellant's counterclaim as a vehicle to obtain judicial review.

We think it settled, at least in this Circuit, that although the Administrative Procedure Act does not permit a trial *de novo* of administrative decisions, *Noren v. Beck,* 199 F. Supp. 708 (D.C. S.D. Cal. 1961); *Adams v. United States,* 318 F. 2d 861 (9 CCA 1963), it does authorize and require judicial review under the standards of the Administrative Procedure Act, *Adams v. Witmer,* 271 F. 2d 29 (9 CCA 1959), *Denison v. Udall,* 248 F. Supp. 942 (D.C. Ariz. 1965), and that a counterclaim is a permissible method of obtaining such review. *Adams v. United States,* supra.

The District Judge rendered judgment for the United States on its complaint and dismissed Appellant's counterclaim, but he did so only after "having considered the files, records and evidence in the case, including the entire certified record of the administrative proceedings." (Tr. 224) In view of this statement, we deem the dismissal of the counterclaim as an affirmance of the decision of the Interior Department on the merits and not as a dismissal because of some procedural deficiency. This is so because the decision invalidating the mining claims is the sole foundation for the ejectment action.

The eighteen mining claims in question were located as building stone claims (30 U.S.C. § 161)[1] on the dry bed of Baldwin Lake and an adjoining mountain within the San Bernardino National Forest during the

[1]"§161. Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests."

period of 1949 to 1952. The claims cover an area of 720 acres. An application for patent was filed by Coleman in January, 1956, and a contest was commenced at the instance of the Forest Service on February 24, 1958, the charges being that:

"(a) The lands embraced within the claims are non-mineral in character.

"(b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

"(c) $500.00 has not been expended on Baldwin Lake Quarry Claims No. 7, 9, 11 to 19, inclusive."

The Hearing Examiner, on December 18, 1958, found five of the mining claims to be valid and the other thirteen to be invalid. On appeal, the Acting Director of the Bureau of Land Management, on June 22, 1960, sustained the validity of three claims and part of a fourth. The Secretary of the Interior, acting through his Deputy Solicitor, in considering the appeal taken by Mr. Coleman, reviewed in detail the evidence introduced at the hearing on the contests. The Deputy Solicitor rendered a decision declaring all the subject mining claims to be null and void for the reason that a valid discovery had not been made. *United States v. Alfred Coleman,* A-28557, March 27, 1962. The ejectment action was filed August 8, 1963.

At the outset, we are faced with contentions by the Government seeking to limit the scope of judicial review of decisions in the Department of the Interior. This campaign commenced some years back when first it was broadly contended that the Administrative Procedure Act does not apply to Decisions of the Secre-

tary of the Interior. This Court had no difficulty in rejecting this contention. *Adams v. Witmer* (9 CCA 1958), 271 F. 2d 29. Cf. *Wong Yong Sung v. McGrath,* 1950, 339 U.S. 33. Next, as in this case, the Secretary has argued that the determination of a question of fact by the "Secretary of Interior, or his authorized representative, is conclusive in the absence of fraud or imposition" and that "decisions of the Secretary of Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies." These are not the standards for review provided in the Administrative Procedure Act adopted in 1946 [5 U.S.C. § 1009(e)]. The Government supports the limited review of actions by the Secretary of the Interior with the footnoted excerpts from the following cases: *Cameron v. United States,* 1920, 252 U.S. 450;[2] *Standard Oil Co. of Cali-*

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[2]*Cameron v. United States,* 252 U.S. 450, at p. 459:

"By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. (Citations omitted.)

"A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

"Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the

fornia v. United States (9 CCA 1940), 107 F. 2d 402, 410;[3] and *Best v. Humboldt Mining Company*, 1963, 371 U.S. 334.[4]

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claim is valid, and, if it be found invalid, to declare it null and void."

Cameron v. United States, 252 U.S. 450, at p. 464:

"Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, * * * [Citations omitted.] Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below."

[3]*Standard Oil Co. of California v. United States*, 107 F. 2d 402, at p. 409:

"The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended. It is a field in which the authority of the Congress is supreme. *Lee v. Johnson*, 116 U.S. 48, 6 S. Ct. 249, 29 L. Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A. Where Congress grants public lands to a state, reserving those known to be mineral as of the approval of the survey, it is thought that there is no constitutional impediment to its delegating to any instrumentality it may select the authority of determining, as a fact, what lands fall within the excluded class. Compare *Shields v. Utah & Idaho R. Co.*, 305 U.S. 177, 59 S. Ct. 160, 83 L. Ed. 111. The state or its transferees obviously have no constitutional right to demand the property on terms differing from those imposed. Their claim to the land does not derive from the Constitution. Nor is the power of Congress, under the broad authorization of that document, so limited as to require the fact-finding agency to make its determination at or prior to the approval of survey.

"The problem, then, as we understand it, is not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant. If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition. The holdings to this effect are too numerous for citation, but among those apposite are *Catholic*

See footnote 4 on p. 6.

Our study of these decisions and others has not persuaded us that Congress intended decisions of the Department of the Interior which reject applications for patents to enjoy a more favored position than those of other executive agencies under the Administrative Procedure Act. The *Cameron* case was decided in 1920, some twenty-six years before the Congress had spoken with respect to the scope and standards of judicial review of administrative rulings. Similarly, the *Stand-*

Bishop of Nesqually v. Gibbon, 158 U.S. 155, 15 S. Ct. 779, 39 L. Ed. 931; *Cameron v. United States,* 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659; *St. Louis Smelting & Refining Co. v. Kemp,* 104 U.S. 636, 26 L. Ed. 875; *Wright v. Roseberry,* 121 U.S. 488, 7 S. Ct. 985, 30 L. Ed. 1039; *Burke v. Southern Pacific R. Co.,* 234 U.S. 669, 34 S. Ct. 907, 58 L. Ed. 1527; *Johnson v. Drew,* 171 U.S. 93, 99, 18 S. Ct. 800, 43 L. Ed. 88."

Standard Oil Co. of California v. United States, 107 F. 2d 402 at p. 410:

"Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, that is, after notice and hearing and upon evidence. *Cameron v. United States, supra; Crowell v. Benson,* 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598, *supra; Shields v. Utah & Idaho R. Co., supra.* Compare *Iron Silver M. Co. v. Campbell,* 135 U.S. 286, 10 S. Ct. 765, 34 L. Ed. 155. But there is here no question of due process. Appellants participated in the proceedings before the department and make no complaint that they were not accorded full opportunity to present their evidence."

[4]*Best v. Humboldt Mining Company,* 371 U.S. 334, at p. 336:

"* * * the department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them."

Best v. Humboldt Mining Company, 371 U.S. 334, at p. 337:

"'Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.' *Orchard v. Alexander,* 157 U.S. 372, 383. If a patent has not issued, controversies over the claims should be solved by appeal to the land department and not to the courts.' *Brown v. Hitchcock,* 173 U.S. 473, 477. And see *Northern Pacific R. Co. v. McComas,* 250 U.S. 387, 392."

ard Oil case in this Circuit was decided six years before the adoption of the Administrative Procedure Act. Nor do we find in the *Best* case any support for the Government's present contentions. True, in that opinion Justice Douglas complimented the work of former Justice Van Devanter and quoted extensively from his opinion in *Cameron*. But the issue decided in *Best* was whether the Government could contest a mining claim administratively during the pendency of a condemnation action, and the Court explicitly, in Fn. 7 (371 U.S. 338), alluded to the present procedures: "Claimants *today* may appeal the Examiner's decision to the Director of the Bureau (43 CFR, 1962 Supp., § 221.1), from him to the Secretary (id., § 221.31), and from there to the courts. Foster v. Seaton, 271 F. 2d 836." Also, in *Best,* the Court significantly refrained from commenting on the claimed onerousness of hearings in the Department as compared with court procedures, and said: "We express no views on those contentions, as each of them can appropriately be raised in the administrative proceedings, *and reserved for judicial review.*" [Emphasis added.]

It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. *Wilbur v. United States ex rel. Krushnic,* 1930, 280 U.S. 306. It is such a legal right which Appellant here seeks to assert, and it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he

may reject "in the absence of fraud or imposition." This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation by action of executive and administrative agencies. *Adams v. Witmer* (9 CCA 1959), 271 F. 2d 29.

The Government also argues that we are here dealing with a "collateral attack" upon final agency action rather than a direct review thereof, and that the judicial surveillance of agency action is, therefore, under a more restrictive standard. The argument is made because after the Secretary's final decision on March 27, 1962, nothing was done by anyone until the United States filed this ejectment action on August 8, 1963. Appellant then sought review of the agency action by counterclaim. *Adams v. United States* (9 CCA 1963), 318 F. 2d 861, involved a similar procedural situation and a dictum there [p. 867] suggested a possible distinction. Upon reflection, however, we cannot discern any reason for a difference respecting the scope and character of review of agency action which would depend upon who commenced the action. This should not be a race to the courthouse. There is no statutory time limit for an aggrieved person to seek judicial review of agency action in the Department of the Interior under 5 U.S.C. § 1009.[5] So far as the Govern-

[5]While the statute (5 U.S.C. § 1031, et seq.) which vests exclusive jurisdiction in the Courts of Appeals to review final orders of certain federal agencies limits the time for such petitions (§ 1034), we find nothing in the Administrative Procedure Act (5 U.S.C. § 1009) relating to review of agency action generally, nor in the Department of Interior rules and regulations, which prescribes a time limitation for district court actions to review final administrative determinations.

ment's present contention is concerned, had Coleman brought an action to review the Secretary's decision one day before the eviction suit was filed, this would have been a direct review rather than a so-called "collateral attack." It serves nothing to talk about collateral attack merely because review of agency action is sought in a counterclaim rather than in a complaint.

The issues, then, which faced the District Court are those provided in the Administrative Procedure Act. Were the "agency actions, findings, and conclusions * * * arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence?" 5 U.S.C. § 1009 (e) (B) (1) (5).

In one form or another each of the decisions rendered within the Department in this case was based upon the issues raised by the second charge of the contest, (b), that a valid discovery had not been made.

In order to validate a mining claim under the mining laws of the United States, there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. §§ 23, 25. The basic test used to determine whether such discovery has been made was stated by the Department in *Castle v. Womble*, 19 I.D. 455, 457 (1894), to be that:

> "* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

The standard has been judicially approved. *Chrisman v. Miller,* 197 U.S. 313; *Cameron v. United States,* 1920, 252 U.S. 450; *Best v. Humboldt Mining Co.,* 1963, 371 U.S. 334.

All mining claims must meet this test to be valid. An additional element to the test of discovery, that of present marketability, has been imposed by the Department where the mineral in question is one of widespread occurrence. The reason for this additional element was made clear in *Foster v. Seaton,* 271 F. 2d 836, 838 (1959):

> "With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining."

On July 23, 1955, Congress enacted what is now Section 611 of Title 30, United States Code. Section 611 provides, in part, that "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *." The purpose of § 611 is clearly revealed in the following quotation from House Report 730, 84th Cong., 1st Sess., 1955, U.S. Congressional & Administrative News, p. 2478:

> "The Committees on Interior and Insular Affairs of both the House and Senate have in the past several years been made increasingly aware of the abuses under the general mining laws by

those persons who locate mining claims on public lands for purposes other than that of legitimate mining activity."

Thus, by enacting § 611, Congress addressed itself to the very problem which the *Foster v. Seaton* test was designed to resolve. Although *Foster v. Seaton* was decided in 1959, it was a review of a Secretary's decision on a contest initiated before 1955 and applied an Interior Department decision made in 1933 in *Layman v. Ellis,* 54 I.D. 294.

The Department's use of Section 611 in this case, as reflected by the final agency decision, constitutes a misapplication and misconstruction of the statute. In the final decision, the Deputy Solicitor stated:

" * * Since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C., 1958 Ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date * * *.

"In view of the immense quantities of identical stone in the area outside the claims, the stone must be considered a 'common variety' within the meaning of the act.

* * * *

"The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. * * * I am unable to find evidence which supports such conclusion as to any of the claims."

We disagree and conclude that proof of discovery as of the time of the contest proceedings is all that is required in this case; that is, that contrary to the Department's assumption, the term "stone" in § 611 does not include "building stone" as that term is used in § 161 and that, therefore, § 611 does not apply at all.[6]

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[6]The Department's interpretation of § 611 as including building stone is at least its second attempt in the history of the mining laws to exclude building stone from the coverage of those laws. The first attempt was thwarted by Congressional action, and we do not believe that the present one is sustainable. The earlier history of building stone as a locatable mineral was succinctly stated in House Report 1204, 52nd Congress, 1st Session, as follows:

> "In the case of *Rosse vs. Wainman*, 14 M. & W., 859, (same case, 2 Exch., 200, and 15 L.J., 67), it was held (quoting syllabus):
>
> "'The term "mineral" is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense beds of stone may be included in the word minerals.'
>
> "So in the case of *Micklethwait vs. Winter*, 6 Exch., 644 (same case, 5 Eng. L. & E., 526); and *Midland R. Co. vs. Checkley*, Law R., 4 Eq., 24, it was held that stone taken from quarries is a mineral.
>
> "The above has been the construction given the mining laws of the United States by the Interior Department since the act of 1872 was passed, until a very recent date, and even now all kinds of stone are held to be subject to mineral entry except building stone, the test applied being uniform with regard to all mineral substances, viz, whether or not the land containing such substance is more valuable therefor than for agricultural purposes. In the case of *Conlin vs. Kelly*, decided in the Department January 2, 1891, and reported in 12 Land Decisions, 1, however, it was held that lands which contain deposits of building stone only are not subject to entry under the mining laws. This decision has brought dismay and threatened ruin and disaster to many citizens who in good faith, relying on the settled and long-continued procedure of the General Land Office, had invested large sums of money in the development of stone quarries upon the public lands, expecting to obtain patents under the mining laws. It changes what had become a recognized rule of property, and the committee think this is a matter which

One of the methods adopted by Congress in 1955 to curtail abuses of the mining laws was the exclusion from previously locatable minerals of common varieties of sand, gravel, pumice, pumicite and cinders. Yet, recognizing that this statutory barrier to abuses of the mining laws was so broad as to cover non-abusive mining claims, the Congress narrowed the scope of the Act by defining "common varieties" in a limited way. As stated in House Report 730, supra: "The last sentence of this section declares that—

> "'Common varieties' as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *,

which language would exclude materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." As finally enacted, § 611 also excluded from its "common varieties" classification "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

When § 611 was enacted, Congress was of necessity well aware of its earlier statute (Sec. 161) respecting

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justly demands the action of Congress to fix the statutes of such land without the possibility of doubt."

Accordingly, Congress enacted Section 161 "to fix the status" of building stone lands. Cf. *Northern Pacific Ry. v. Soderberg* (1903), 188 U.S. 526. Graceful acceptance of this Congressional mandate proved impossible for the Department in the long run. First the present marketability requirements as expressed in *Foster v. Seaton* was applied to the exclusion of the *Castle v. Womble* test of discovery, thereby imposing an onerous burden on the building stone miner. Then followed the attempt to use § 611 to eliminate building stone as a discoverable mineral, an interpretation of that section which we believe was not intended by the Congress.

building stone. Nowhere in the available legislative history of § 611 is there found any indication of a Congressional intent to repeal § 161. Certainly there was no express repeal, and repeals by implication are not favored. *United States v. Zacks,* 375 U.S. 59 (1963); *Silver v. New York Stock Exchange,* 373 U.S. 341, rehearing denied 375 U.S. 870 (1963). It is a settled rule of statutory construction that a general law is not held to repeal or supersede an earlier specific law in the absence of a definite expressed intention. *Stewart v. United States* (9 CCA 1939), 106 F. 2d 405; *Anderson v. Gladden,* D.C. Ore. 1961, 188 F. Supp. 666, aff. 293 F. 2d 463. Stone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone. Thus § 611 does not bar location of mining claims for building stone under §161. The department's "quantity equals common variety" formula is not consistent with either the letter or the spirit of the 1955 statute, and represents a departure from the earlier and, we think, correct position of the Department as expressed by the Bureau of Land Management in two letters appended to Appellant's brief.[7] One letter, dated October 11, 1957, signed by Mac Caplan "for the Director", states: "Stone, commercially valuable because of distinct and special properties, such as * * * stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, * * * would not be considered common varieties."

The other letter, dated February 9, 1959, signed by W. L. Shafer "for the Director" contains virtually

[7]These letters are not part of the evidentiary record before this Court. However, as an aid to our decision of a matter of law, we believe it proper to notice them.

identical language. Whether or not these letters represent an official position of the Department need not concern us as we decide, as a matter of law, that the existence of § 161 precludes application of § 611 to building stone.

The Interior Department decisions and regulations and Court rulings over the years have been interpretations of the General Mining Law of 1872 (17 Stat. 91), which with respect to the validity of mining locations and applications for patents of mining claims, has remained virtually unchanged since enactment. The problem here presented concerns the interpretation of "valuable mineral deposit" (30 U.S.C. § 22) and "valuable deposits" (30 U.S.C. § 29) as used by the Congress. See: *Adams v. United States* (9 CCA 1963), 318 F. 2d 861, 870. Since *Castle v. Womble,* supra, the basic, judicially approved, standard of discovery of a valuable mineral requires proof that a person of ordinary prudence would be justified in further expenditure of his labor and means, with reasonable prospect of success, in developing a paying mine. "But value, in the sense of proved ability to mine the deposit at a profit need not be shown." *Adams v. United States,* supra. This is clearly the standard applied to metallic minerals and minerals of limited occurrence. There is nothing in the mining laws which justifies a different standard for non-metallic minerals or minerals of widespread occurrence insofar as proof of a "valuable" mineral discovery is involved. In fact, with respect to building stone, the Congress has expressly stated: "Any person authorized to enter lands *under the mining laws* of the United States may enter lands that are chiefly valuable for building stone *under the provisions of law*

in relation to placer-mineral claims." 30 U.S.C. § 161. [Emphasis added.] Thus it was implied that building stone claims must meet the same standards, and no greater standards, than those for the discovery of other valuable minerals. Cf. *Mulkern v. Hammitt,* (9 CCA 1964), 326 F. 2d 896, sand and gypsum claims.

What, then, is the import of *Foster v. Seaton* (D.C. Cir. 1959), 271 F. 2d 836, and the Interior Department decisions which it followed? On casual reading, it appears to add additional, administratively imposed, non-statutory requirements for the discovery of "valuable" minerals of widespread occurrence. These are: Accessibility, bona fides in development, proximity to market, existence of present demand and other factors (to show that) the deposit is of such value that it can be mined, removed and disposed of at a profit." As interpreted by the Department of the Interior in the present case, as well as others, these are tests of the discovery of a "valuable" mineral deposit and have resulted in an absolute requirement that the locator prove a present profit, in derogation of the rule of *Castle v. Womble.* We suggest that this is an incorrect interpretation of the *Foster* case for the following reasons: (1) There is nothing in the general mining law authorizing location of valuable minerals which justifies, or even suggests, a distinction between minerals of widespread occurrence and minerals of more limited occurrence; thus, the interpretation is not based upon the voice of Congress but is legislative in character; (2) the purpose of the requirements is "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands *for purposes other than mining*" (*Foster v. Seaton,* 271 F.

2d at 838), an objective which is substantially unrelated to the factual determination of discovery of a "valuable" mineral under the *Castle v. Womble* criteria; (3) the Interior Department decisions after the leading case, *Layman v. Ellis,* 52 I.D. 714, 54 I.D. 294, represent misapplications and unwarranted extensions of the expressed rationale and basis of that decision; and (4) at least one of the requirements stated, "bona fides of development", has nothing at all to do with proof of present marketability at a profit.

We think that *Foster v. Seaton,* on proper analysis, is judicial recognition of the requirement of the good faith of the applicant for a mineral patent, a requirement which finds a foundation in the Act of Congress, for 30 U.S.C. § 29 provides: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * having claimed and located a piece of land *for such purposes* * * * may file, [etc.]" This is an explicit statement that the purpose and motive of the applicant are proper subjects of inquiry and that if the claims were located in bad faith and not for the purpose of mining valuable mineral deposits, the application for patent may be rejected.[8]

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[8]This implication from the mining laws is recognized in the Departmental regulations:
43 C.F.R. 3413.1:

> "No lode claims shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently *to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors,* before sufficient work has been done to determine whether a vein or lode really exists."

(This footnote is continued on the next page)

The confusion which has been caused by the Department's efforts to distinguish between non-metallic and metallic minerals and between minerals of limited and of widespread occurrence in defining standards for a discovery of valuable mineral under the mining laws, distinctions which have no basis in the statutes, is demonstrated in the mining texts, American Law of Mining, Vol. I, § 4.26, pp. 646-647:

> "While the Land Department decisions do present some rather extreme examples of stringency and harshness in applying the prudent man test to mining claims, this should not be taken to indicate that the same rigid standards will be applied in all cases, especially where there have been no withdrawals; no one has protested the issuance of patent; a contest has not been instigated by the Forest Service or other agency; and the claims are in fact located in good faith for the purpose of acquiring the land because of its mineral deposits. The Land Department has not looked favorably upon attempts to acquire public domain land having values for subdivision, recreational

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43 C.F.R. 3452.1 (pertaining to proving title under 30 U.S.C. § 38): "When an applicant desires to make his proof of possessory right in accordance with this provision of law he * * * will be required to furnish * * * any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides * * *."

43 C.F.R. 3470.3:

> "In placer applications, in addition to the recitals necessary in and to both vein or lode or placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation *and* that title is sought not to control water courses or to obtain valuable timber but *in good faith because of the mineral therein.*" [Emphasis added.]

timber or other uses by the device of locating mining claims for minerals which are sometimes of dubious value. If not convinced of the good faith of the mining claimant in such situations, it seems probable that the mineral examiners, hearing officers and other officers and agents of the Land Department will take a very strict view of mining locations in such areas and that the prudent man test will be applied very strictly, verging on a commercial value requirement, even where the minerals in question have intrinsic value.

"This is not to say that mining claims cannot be legitimately made and the discoveries thereon supported where the land is valuable for reasons other than its mineral content, but the burden of sustaining such claims is greatly increased in such cases."

The leading Interior Department decision from which stems the present departmental requirement of proof of present marketability at a profit for patentability of locations claiming minerals of widespread occurrence is *Layman v. Ellis,* (1929), 52 I.D. 714, aff'd 54 I.D. 294. The first decision, holding sand and gravel to be locatable minerals, does not discuss the requirements for proof of discovery of valuable minerals, but cites *Lindley on Mines,* § 98:

"The mineral character of the land is established when it is shown to have upon or within it such a substance as—

"(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

"(b) Is classified as a mineral product in trade or commerce; or—

"(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

"And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

The decision concludes that "valuable gravel deposits fall within categories (b) and (c) of Mr. Lindley." It is noted that Lindley suggested proof of present marketability at a profit as an alternative to the *Castle v. Womble* test. When Acting Solicitor (now Judge) Fahy reviewed and affirmed the decision (1933, 54 I.D. 294), he explained:

"The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and extent which under the same limitations and qualifications are locat-

able and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance, where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of Layman et al. v. Ellis. It follows that sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use, not only on Federal aid highways, but for other purposes."

This is the genesis of the Department's absolute requirement of proof of present marketability at a profit to sustain a location of minerals of widespread occurrence. *Estate of Victor E. Hanny,* 63 I.D. 369 (1956); *United States v. Everett Foster, et al.,* 65 I.D. 1 (1958), aff'd *Foster v. Seaton,* 271 F. 2d 836 (1959); *United States v. Strauss,* 59 I.D. 129 (1945); *United States v. George W. Black,* 64 I.D. 93 (1957); *United States v. Barngrover,* 57 I.D. 533 (1942); *United States v. Fife,* A-28386 (Sept. 19, 1960); *United States v. Philip Jungert,* A-28199 (April 14,

1960); *United States v. Jacobo Armenta,* A-28248 (June 22, 1960). We think the foundation does not support the structure. The *Ellis* cases, as was articulated in *Foster v. Seaton,* deal with the purpose of the location, in essence, the bona fides of the claimant, and seek to preclude the seizure of public lands for purposes other than mining under the mining laws. We perceive no reason for a distinction between a placer claim allegedly for gold bearing sand and a placer claim for building stone with respect to the requirements for proof of presence of a valuable mineral. The prudent man test of *Castle v. Womble* should suffice for either. Cf. *Mulkern v. Hammit,* supra, sand and gypsum; *Adams v. United States,* supra, sand and gold; *Henrikson v. Udall* (9 CCA 1965), 350 F. 2d 949, 229 F. Supp. 510, sand and gravel. In addition, the applicant may be required to show, if challenged to do so, that the claims were located in good faith for the minerals therein, and not for other unrealted purposes.

This, of course, is not to suggest that the *Foster v. Seaton* guidelines of accessibility, bona fides in development, proximity to market and existence of a present demand and other factors are irrelevant as evidence bearing upon the ultimate issues of good faith and existence of a valuable mineral deposit. But these ultimate issues should be resolved in each case from the evidence as a whole and it is improper, in our view, to convert one aspect of relevant evidence into an absolute legal requirement with respect to a certain class of minerals in derogation of a time-honored, judicially approved test of "value" applicable to all locatable minerals.

Inasmuch as this case should be remanded to the Department for reconsideration under correct legal standards, there are other matters which deserve brief comment. In his final decision, the Deputy Solicitor remarked that the Appellant did not make the required showing of marketability as to all claims. He said: "Whether expenditures for improvements on other claims may or may not be credited to these (disallowed) claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims." The *Castle v. Womble* prudent man test does not require such a showing, although such evidence is of course, relevant proof under the issue as to each separate mining claim. The *Castle v. Womble* test implies a forecast of the reasonably anticipable future. Further, the Department placed great weight upon Coleman's testimony that he had devoted over four thousand hours working on the claims for eight or nine years, which, computed at $3.50 per hour, meant an expenditure of $157,500 in labor, and concluded that Coleman could not conceivably have made a profit. We have found no case authority on the subject of whether the calculated value of a locator's labor in developing the property should be charged as an expense in determining profitability.[9] This may be because the

[9]The Director of the Bureau of Land Management, in his decision in this case, minimized the weight of this testimony, saying:

"The record shows that stone has been removed and marketed from those claims ever since their location in 1949. Income from past sales has just about equalled the cost and

(This footnote is continued on the next page)

question has not arisen under the *Castle v. Womble* test of reasonable expectation of profit, while the Departmental requirement of proof of present profit for location of non-metallic minerals of widespread occurrence is of fairly recent origin. In any event, the history of prospecting and mining in the Western United States records the essence of individualism in economic activity and the Mining Law of 1872 was enacted as a Congressional codification of the procedures and practices of miners. Academic economics has little meaning for a miner and his "profit" is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor.

Coleman represented himself in the evidentiary hearing before the Hearings Examiner in 1958 and throughout the administrative appeals. He was quite evidently bewildered by the Government's assertion that the claims were not mineral in character and that there had been

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value of improvements without allowance for any recompense to Mr. Coleman for his own labor. Be that as it may, it is good accounting procedure to amortize the cost of permanent improvements over a long period of time; current and/or future expenditures for maintenance will be far less than the initial costs. Under such circumstances, continued sales, even at the rate shown for the first ten years of operations have and will result in a livelihood to Mr. Coleman; he will realize a profit from operations over and above the value of his own labor. It matters not that the stone operations may not sustain a mammoth operation by a large company; it is sufficient that a prudent man be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Since a continuing and steady market, albeit not expanding, is shown to exist, and marketability of the product at a profit (even though not a great one) is shown, discovery within the meaning of the mining laws, all else being regular, is established."

no discovery of valuable minerals, relying with assurance, and some justification we have found, on 30 U.S.C. § 161. Although he was properly guided by the Hearing Examiner, to a degree, his lack of awareness of the issues upon which the case was ultimately determined by the Secretary is evident. We think that if the Department of Interior intends to put in issue Coleman's good faith as an applicant for patent, it should so state in the contest complaint. Under the circumstances, the whole proceeding should be remanded to the Department.

In summary, we hold:

1. The decision of the Secretary of Interior invalidating Coleman's building stone claims was properly before the District Court for review under the counterclaim.

2. The standards of review are those elucidated in the Administrative Procedure Act (5 U.S.C. § 1009).

3. Congress, by enacting 30 U.S.C. § 611, did not repeal 30 U.S.C. § 161 concerning building stone, and proof of discovery of a valuable mineral is to be determined as of the date of the contest hearing and not as of July 23, 1955.

4. The applicable criteria of presence of a valuable mineral in each of the claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

5. If the good faith of the applicant in locating the ground for the asserted purpose of exploiting the minerals therein is an issue, the applicant for patent should be put on notice of the issue in the contest complaint.

6. The decision of the Secretary of the Interior invalidating Coleman's mining claims is not in accordance with law and, under the circumstances related, is arbitrary, capricious and an abuse of discretion, and should be set aside.

Accordingly, this case is remanded to the District Court with instructions to enter judgment denying plaintiff's prayer for ejectment and, on the counterclaim, reversing the final decision of the Secretary of the Interior and remanding the case to the Department of the Interior for further proceedings and decision in accordance with the principles herein enunciated.

Judgment.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20227

ALFRED COLEMAN AND EDWARD J. McCLENNAN, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is remanded to the said District Court with instructions to enter judgment denying plaintiff's prayer for ejectment and, on the counterlcaim, reversing the final decision of the Secretary of the Interior and remanding the case to the Department of the Interior for further proceedings and decision in accordance with the principles herein enunciated.

Filed and entered June 21, 1966

Order.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,227

ALFRED COLEMAN AND EDWARD J. McCLENNAN, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

ON REHEARING

Following this Court's opinion and decision filed June 21, 1966 (*Coleman v. United States,* 9th Cir. 1966, 363 F. 2d 190), the United States petitioned for a rehearing. The Court then entered an order inviting Stewart L. Udall, Secretary of the Interior, to move to join as a counterclaim defendant and appellee (See *Mulloney v. Anderson,* 1952, 342 U.S. 415). Such a motion was made, and an order was entered joining Stewart L. Udall, Secretary of the Interior, as a counterclaim defendant and appellee, and a rehearing was granted. Briefs were filed and oral argument entertained on June 15, 1967.

After thorough reconsideration of the issues involved and the arguments of the opposing parties, the Court adheres to and confirms the opinion and decision filed June 21, 1966.

s/ RICHARD H. CHAMBERS,
Circuit Judge.
s/ GILBERT H. JERTBERG,
Circuit Judge.
s/ BRUCE R. THOMPSON,
District Judge.

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington 25, D.C.

A-28557

Decided Mar. 27, 1962

UNITED STATES
v.
ALFRED COLEMAN

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred Coleman has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 22, 1960, which modified a hearing examiner's conclusion holding null and void 13 of the 18 placer mining claims and holding the remaining 5 claims to be valid. The Acting Director held an additional claim and 20 acres of another, null and void, thus sustaining the validity of only 3 claims and part of a fourth claim.

The claims, which comprise 720 acres situated in the dry bed of Baldwin Lake and on an adjoining steep mountain, are in the San Bernardino National Forest in California. They were located for quartzite which outcrops on all the claims and is thought to extend 1000 feet below the surface. The claims, designated as the Baldwin Lake Quarry Claims Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, were located and relocated in the period 1949-1955. Application for patent was filed in January 1956, and on February 25, 1958, a contest was commenced on charges that the land in the claims is nonmineral; that minerals

had not been found in sufficient quantities to constitute a valid discovery; and that $500 had not been expended in improvements on claims 7, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19. A hearing was held on September 16, 1958.

At the hearing, Coleman testified that he had devoted all of his time and effort to development of the claims during the 10 years since the location. He said, however, he felt that proper development would require removal of rock from the top of the mountain downward and, therefore, he had devoted his efforts to the construction of a home which would permit him to live on one of the claims, to the development of sewage disposal facilities and a water supply for domestic use and for quarrying and processing operations at a later time, and to the building of roads to provide access to the higher claims. He used weathered rock fragments in the construction of his house and in fencing the area of the spring and for fill in the dwelling area. He sold an estimated 1000 tons over the 10-year period, but did not attempt to commence active quarrying operations although he installed some rock processing equipment. He said that he needed title to all of the claims to be able to provide a complete range of colors of ornamental rock for construction use and as security for loans that he might need in the future, as well as for proper development of the claims. He said he did not want to attempt extensive sales until he was fully equipped to offer a wide selection of colors and certain delivery. Shortly before the hearing, he entered into a lease permitting his lessee to process and dispose of sand, gravel and other severed rock products not including building stone. The lessee testified that he installed his own

equipment and that he sold in excess of $4000 worth of sand, gravel, lateral rock for septic tank leaching fields and fill material in the first 2½ months of operations under the lease.

Coleman did not controvert the charge that less than $500 worth of work had been done on many of the claims, but he contended that the requirements of the mining laws had been met by the placing on some of the claims of extensive improvements which are of value to all of them. On cross examination, he gave what he termed as wild estimates of the value of the improvements placed on and of the materials removed from all of the claims. His total valuation for improvements on the 18 claims was $17,200; for materials removed $15,990. He admitted that the improvements on 11 of the claims did not exceed $150 in value. He claimed $1500 on 3 claims, $4000 for roadwork on one claim and $6500 for his combined home, garage and shop on one of the claims. On the remaining 2 claims, he gave values of $200 and $750. He also admitted no removals of rock or rock products from 6 of the claims; removals valued at $60 from one claim; from $100 to $120 from 3 claims; $240, $250 and $350 from 3 others; $1350, $1500 (from each of 2 claims) and $2000 from 4 more; and $8400 from one over the 10-year period.

The government's witnesses testified that there are large quantities of quartzite of various colors on the claims and in the area of 28,000 acres of which the claims are a part; that such rock can be used for construction purposes; that there is not a great demand for it because it is very heavy and, therefore, expensive to handle; that it splits unpredictably so that there is a great deal of waste which can be utilized for gravel

only with considerable expense for crushing because of its hardness; and that it cannot be split into thin layers for facing and surfacing, which greatly increases the weight of the quantity of material required for covering a given area over the requirements for other accessible rock. Coleman's estimate of sales amounting to $12,000 over a 10-year period was not questioned, nor his report of sales amounting to $1025 in 1957, but a government's witness stated that he felt that the roads on the claims evidenced lesser values than Coleman claimed. He concluded that the possible demand for rock from the claims and the evident increasing difficulty of producing disposable rock as the more usable fractions are removed could not justify a prudent man in spending time and money with a reasonable chance of success in developing a valuable enterprise.

The hearing examiner summarized all of the evidence presented at the hearing, noting the very widespread occurrence of the stone claimed as a discovery, the limited potential market and the paucity of the claimant's sales. He concluded, however, that the Colemans[1] had "established a limited market for the types of building stone found upon their claims" and had in good faith developed claims numbered 1, 4, 5, 8 and 10. He, therefore, declared these 5 claims validated by discovery and the 13 other claims null and void. On appeal, the Acting Director noted that Coleman's sales have not afforded him any recompense for his continuous labor over a 10-year period, but concluded that there is a market for a limited amount of building stone from 3 claims and a portion of one other

[1]The contest was brought against Mr. and Mrs. Coleman but Mrs. Coleman died while the appeal was pending before the Director.

claim that are most fully developed, and from which the bulk of his sales have been made, so that continued sales at the rate shown for the first 10 years of operations will produce a profit over and above the value of Coleman's labor in removing the stone from these claims. Accordingly, he approved the examiner's judgment as to a valid discovery on claims numbered 1, 5, 8 and the portion of No. 10 described as the N½ SE¼ NW¼ of section 7, T. 2N., R. 2E., S. B. M. He added claim No. 4 and the west one-half of claim No. 10 to the list of null and void claims.

In its successive appeals from the validation of some of the claims, the Forest Service has contended that there has been no discovery of a valuable mineral deposit on any of them because of Coleman's inability to sell anything removed from the claims at a price which includes the reasonable value of his labor. It points out that because the claims are located in a national forest, the evidence of their validity should be clear and unequivocal, citing the Department's decision in *United States v. Duvall,* 65 I.D. 458, 661 (1958).

In his appeals, Coleman contends that the charges against his claims of nonmineral land and no discovery have no validity in view of the 720 acres of solid rock fully exposed to view and that his evidence of improvements shows clearly that sufficient expenditures have been made on some of the claims for the benefit of all of the claims. He urges that the charges be dropped and that the land office conclude the patent proceedings without further delay.

It is well-established that a mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the

limits of the claim (30 U.S.C., 1958 ed., secs. 23, 35). The act of August 4, 1892 (30 U.S.C., 1958 ed. sec. 161), expressly authorizes the location of mining claims for building stone. Therefore, it was essential in this contest that Coleman show that he has made a discovery of building stone within the limits of his claims. This Department held early in the history of proceedings under the mining laws that a validating discovery is shown by reasonable evidence of a finding of mineral of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (*Castle v. Womble,* 19 L.D. 455 (1894)), and this standard has been sanctioned by the courts. *Chrisman v. Miller,* 197 U.S. 313 (1905); *Cameron v. United States,* 252 U.S. 450 (1920); *Foster v. Seaton,* 271 F. 2d 836 (D.C. Cir. 1959). When the mineral claimed as a discovery is one of wide occurrence the Department has held that the characterization of a deposit of such material as a valuable mineral is dependent upon a showing that it can be extracted, removed and marketed at a profit. *Layman et al v. Ellis,* 52 I.D. 714 (1929); *United States v. Barngrover et al.,* 57 I.D. 533 (1942); see also *Ickes v. Underwood,* 141 F. 2d 546, 549 (D.C. Cir. 1944). To justify his possession of public land, the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, a deposit of materials such as building stone or sand and gravel is of such value that it can be processed, removed and disposed of at a profit. Solicitor's opinion, 54 I.D. 294, 296 (1933);

United States v. Strauss et al., 59 I.D. 129 (1945); *United States v. Foster et al.*, 65 I.D. 1 (1958), aff'd *Foster et al. v. Seaton, supra.* See also *United States v. Estate of Hanny*, 63 I.D. 369, 373 (1956); *United States v. Black*, 64 I.D. 93, 96 (1957); *United States v. Fife et al.*, A-28386 (September 19, 1960).

Furthermore, since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C., 1958 ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date. *United States v. Fife, et al. (supra).*

In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a "common variety" within the meaning of the act.

It is very clear that Coleman did not make the showing required as to the undeveloped claims which the Acting Director declared to be null and void. Whether expenditures for improvements on other claims may or may not be credited to these claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims in 1955 or even in 1958 when the hearing was held. Coleman presented evidence of sales from the four claims upon which the bulk of his improvements were placed. However, he admitted that he did not make any profit on his rock sales. He testified to estimated removals of rock, not all of which was sold, valued

at $15,990. He also testified to labor on the claims (more than 3000 days from 12 to 18 hours in length at $2.50 per hour) of the value of at least $157,500. (Tr. 116, 117.)[2] It is not clear that his estimate of the value of his labor included the costs of obtaining and operating the equipment by which it was accomplished; in the absence of an explanation it is reasonable to assume that $3.50 per hour was not intended to cover the use of trucks, bulldozer and blasting equipment. But even if it were possible to amortize the costs of acquiring his heavy equipment, the great disparity between his own estimate of the value of the mineral actually marketed from the claims and the costs of doing so indicates the absence of any element of profit.

The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. The testimony of the government's mineral examiner, describing an examination of the claims in Coleman's company and of his sales records, and that of a producer and distributor of stone products, describing the market for rock and stone in southern California, are sufficient to constitute a prima facie showing of invalidity. The burden was upon Coleman to show by a preponderance of the evidence that each of his claims was validated by a discovery of a valuable mineral deposit within its boundaries. *Foster v. Seaton, supra.* He was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of dis-

[2]This reference is to the pages of the transcript of the testimony offered at the hearing.

covery was based could be mined, removed and disposed of at a profit. See *United States v. Philip Jungert*, A-28199 (April 14, 1960); *United States v. Jacobo Armenta et al.*, A-28248 (June 22, 1960). I am unable to find evidence which supports such conclusion as to any of the claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed in so far as that decision held 14½ of Coleman's Baldwin Lake quarry mining claims null and void and reversed in so far as it held 3½ of his claims validated by discovery. All of the Baldwin Lake quarry placer mining claims are hereby held to be null and void.

EDWARD W. FISHER,
Deputy Solicitor